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No. 445

Supreme Court of the United States

OCTOBER TERM, 1944

BROOKLYN SAVINGS BANK,

Petitioner,

v.

WILLIAM J. O'NEIL,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE RESPONDENT

MAX R. SIMON,
Attorney for Respondent.

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BRIEF FOR THE RESPONDENT

Opinions Below

The Municipal Court of the City of New York, Borough of Manhattan, First District, dismissed the complaint without opinion after trial without a jury. The unanimous opinion of the Supreme Court of the State of New York, Appellate Term, reversing and directing judgment in favor of plaintiff, is reported in 180 Misc. 542 (R. 59). The opinion of the Appellate Division of the Supreme Court of the State of New York, First Department, further affirming, appears in 267 App. Div. 317 (R. 65-73). The Court of Appeals of the State of New York handed down its unanimous affirmance on June 14, 1944. The per curiam affirmance, which indicates the questions involved and passed upon, appears in 293 N. Y. 666.

Jurisdiction

The Court of Appeals of the State of New York—which is the highest Court of the State in which a decision in the suit could be had—issued its remittitur on June 14, 1944 (R. 75). The final judgment of the Municipal Court of the City of New York, after filing of the remittitur, was entered on August 17, 1944 (R. 77). The petition for writ of certiorari was filed on September 8, 1944, and was granted, limited to the second question in the petition, on November 6, 1944 (R. 83). Petitioner has invoked jurisdiction of this Court under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925.

Statement

Respondent was employed by petitioner as a night watchman at a commercial building located in the City of New York, from October 24, 1938, the date when the Fair Labor Standards Act went into effect, to August 30, 1940 (R. 6, 13). He brought this action under Section 16(b) of the Act to recover the sum of $423.16 as liquidated damages resulting from the petitioner's retention for several years of an equal amount which respondent concededly earned as overtime under Section 7 of the Act during the period of his employment.

On June 1, 1942, this Court in *Kirschbaum* v. *Walling*, 316 U. S. 517, held subject to the overtime provisions of the Fair Labor Standards Act night watchmen, such as respondent, employed in guarding against fire and theft commercial buildings housing, as here, tenants producing goods for interstate commerce. On June 8, 1942, this Court in *Overnight Motor Transport Co.* v. *Missel*, 316 U. S. 572, held that, in view of the mandatory character of the statutory language, an employer who has violated the overtime provisions of the Act becomes automatically

liable for "an additional equal amount as liquidated damages" under Section 16(b), regardless of good faith or alleged inability to determine that the Act applied. Thereafter in November of 1942 (R. 6), long after plaintiff's employment had terminated, and long after the overtime compensation in question had been earned: petitioner paid respondent the sum of $423.16 concededly earned as overtime under the Act during the period he was employed.* Before getting his back overtime, respondent was required to sign "certain papers" (R. 49) constituting a "form release" (R. 49) by which petitioner sought to relieve itself "from any and all claims, debts, damages or liabilities arising out of or in connection with his claim of any kind or character, whatsoever growing out of his overtime employment" (R. 6). Respondent was never advised that petitioner was then equally liable to him under the statute for an additional amount as liquidated damages, although petitioner claims to have "explained" that the paper respondent "was to sign * * * was to cover overtime and costs or anything arising out of his employment" (R. 47). No demand for payment was ever made of the bank (R. 17), nor did petitioner, at the time of payment, dispute respondent's right to this back overtime or deny that respondent's employment was subject to the Act's coverage (R. 16).

On February 16, 1943, this suit was instituted to recover the unpaid liquidated damages. Respondent's right to recover has heretofore been affirmatively upheld on three different appeals; upon each appeal every issue of law and fact involved has been resolved against petitioner and in favor of respondent.

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* Petitioner did not pay this back overtime as the result of a settlement of a "disputed application through equity proceedings" by the Wages and Hour Administrator (Pet. Br., pp. 17 and 18). Not until after the *Kirschbaum* and *Overnight* decisions by this Court, whereby petitioner's liability was conclusively established in double the amount of the wage underpayment, did it make any payment at all,—and then it paid only one-half.

The Question Presented

The questions certified by the New York Court of Appeals in its remittitur as having been duly presented and involved there were (R. 106):

1. That an action may not be maintained under Section 16(b) of the Act by an employee solely for the recovery of liquidated damages when it is admitted that all overtime compensation was voluntarily paid in full by the employer prior to the institution of suit.

2. That the release of all further claims and damages under the Fair Labor Standards Act executed by the employee and delivered to his employer at the time he received payment of all overtime compensation due him under the Act is a good defense to an action subsequently brought by such employee solely to recover liquidated damages.

3. That the imposition of liquidated damages deprives an employer of property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

Petitioner sought certiorari on each of these questions (Pet. for Writ. p. 2), but this Court, in granting the petition for a writ, limited its review to the second question only (R. 83).*

Under the circumstances, petitioner seeks to evade the limits of the review in urging that the question here presented is "whether an employee has a right to statutory liquidated damages for non-payment of overtime under the Fair Labor Standards Act where, prior to

* Petitioner paraphrased this question as follows: "Whether upon such payment (i. e. back overtime) a release of any such additional liability does not bar recovery of such damages (Pet. for Writ, p. 2, question 2).

either claim or suit therefor, the employer has voluntarily paid the full amount of such overtime and the employee has given a release of any such additional liability" (Pet. Br., p. 2). Petitioner, in stating the issue, has obviously lumped together both the first and second questions and is here renewing its attempt to obtain a review of issues which this Court has refused to accept (compare Pet. Br., pp. 7, 11, 12 and 13; Pet. for Writ, pp. 5, 6, 10, 11, 16, 17, 18 and 19).

Nor is it here necessary for respondent to again demonstrate that his employment was subject to the Act's coverage. This issue was resolved in respondent's favor on the three different appeals previously had and the petitioner has not preserved this issue for further review (compare Pet. Br., pp. 4 and 5; Pet. for Writ, p. 5). Similarly, respondent refrains from joining issue on arguments impugning the constitutionality of Section 16(b) of the Act because this Court has declined review upon this ground also (R. 106, question 3; R. 83; compare Pet. for Writ, p. 2 and Pet. Br., pp. 16 and 17).

Finally, in its specification of errors (Pet. Br., p. 6) petitioner urges that the New York State Court of Appeals failed "to give effect to the well established policy of the law to encourage the amicable adjustment of disputes by arm's length negotiation * * * in permitting respondent to repudiate the settlement." In its brief, also, petitioner would have it appear that this appeal involves a question of accord and satisfaction.* But this ignores

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* See for example references to "settlement of controversies" (Pet. Br., p. 17); "a purported attempt to "freely reach a settlement" (Pet. Br., p. 16) or to "adjust their own controversies" (Pet. Br., p. 13); "mutually voluntary adjustment" (Pet. Br., pp. 8, 15).

The record abundantly supports the failure of the New York Court of Appeals to certify any question of accord and satisfaction (R. 106). In the first place, in introducing the release into evidence, defense counsel stated: "This is the release which we plead by way of a

(Continued on following page)

the precise language of the remittitur of the New York State Court of Appeals which clearly indicates that there is here involved merely the question of legal sufficiency of a release. And this Court has limited its review accordingly.

Statute Involved

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C., Secs. 201 *et seq.*) are set forth in the appendix.

(*Continued from previous page*)

complete defense to the action" (R. 43). Subsequently, petitioner's motion to dismiss at the close of the entire case was phrased as follows: "Your Honor, I respectfully renew my motion for a dismissal of the complaint * * * for the reason that the plaintiff released any claim for liquidated damages" (R. 51). Finally, there was neither pleaded nor proved here a settlement of "a genuine controversy * * * involving an actual and substantial difference of opinion [as when] one asserts the validity of his claim, and the other * * * in good faith * * * denies all or part of it." *Schuttinger* v. *Woodruff*, 259 N. Y. 212, 216. See also *Union Prod. Co.* v. *Parduc*, 117 F. (2d) 225, 227 (C. C. A. 5, 1941); *Nelson* v. *Chicago Mill & Lumber Corp.*, 76 F. (2d) 17, 23 (C. C. A. 8, 1935).

As the Second Circuit recently held in *Fleming* v. *Post*, F. (2d) , 7 Wage Hour Reporter 1206, 8 Labor Cases (C. C. H.) par. 62,450 (C. C. A. 2, Dec. 14, 1944): "A condition precedent to a valid accord and satisfaction is the establishment of a bona fide dispute * * *." The record would seem to reveal no actual and substantial difference of opinion as to liability asserted and denied by the opposing party. Petitioner here ignores its obligation to specifically plead the affirmative defense of accord in its answer (New York Civil Practice Act, Section 242) and to assume the burden of its proof (*Cornell* v. *Taylor*, 137 A. D. 496; *Ralston* v. *Reynolds* 134 Misc. 462, aff'd 227 A. D. 768, aff'd 253 N. Y. 605), and now attempts to torture its only defense of release (R. 6, pars. 6 and 7 of answer) into a plea of compromise and settlement or accord and satisfaction.

ARGUMENT

Considerations of Paramount Public Policy Dictate that Release is not a Good Defense to an Action by an Employee to Recover Liquidated Damages Under the Fair Labor Standards Act.

A.

The liability for liquidated damages under Section 16(b) is a mandatory liability regardless of the nature of the violation.

Section 16(b) of the Act, insofar as here applicable, provides that "any employer who violates the provisions of Section 6 or Section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages."

The mandatory character of the liability for liquidated damages under Section 16(b), regardless of the nature of the violation, has been clear since *Overnight Motor Transp. Co., Inc.* v. *Missel*, 316 U. S. 572 (1942), affg. 126 F. (2d) 98 (C. C. A. 4, 1942). The Circuit Court of Appeals had there said:

> Is this provision of the law as to liquidated damages mandatory or discretionary? Since the Act has been violated in good faith in this case, we would indeed like to hold that it is discretionary. It seems a keen injustice for employers bewildered by strange legislalation and confused by divergent authority in the Courts to be subjected to such a measure. Yet no matter how much we lament its harshness, the section appears to be mandatory and virtually all of the Courts have so construed it. The use of the word "willful" in Section 16(a) defining criminal liability under the Act and its omission in Section 16(b) defining civil liability would seem to indicate that the employer's good faith is immaterial under Section 16(b). [126 F. (2d) 110-111.]

In affirming, this Court observed:

> In the Circuit Court of Appeals it was held that the liquidated damages provision, Section 16(b) of the Act, was mandatory on the Courts, regardless of the good faith of the employer or the reasonableness of his attitude. Petitioner attacks this conclusion as a denial of due process because if the damage provision is mandatory, the employer is 'without opportunity to test the issues before the Courts' * * *. Petitioner points out that if there was a failure to pay the statutory overtime, it resulted from an inability to determine whether the employee was covered by the Act * * *.
>
> Perplexing as petitioner's problem may have been the difficulty does not warrant shifting the burden to the employee. The wages were specified for him by the statute, and he was no more at fault than the employer. The liquidated damages for failure to pay the minimum wages under Section 6(a) and 7(a) are compensation, not a penalty or punishment by the Government * * *. The retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages. [316 U. S. 581, 583.]

Thus, respondent's recovery here automatically follows, unless a release of claims under Section 16(b), upon partial payment of the full fixed liability imposed by the mandatory provisions of the section, was a good defense to the action.

B.

The public policy underlying legislation prescribing, in the public interest, minimum wage and hour standards for the benefit of wage-earners forbids a release, or waiver of any part of the sums required to be paid by the employer.

It long has been established that legislation prescribing minimum wage or hour standards for the benefit of the working man is profoundly affected with the public inter-

est,—being intended not only only for the benefit of the individual wage-earner but to protect and safeguard the community at large as well. As the Chief Justice observed in his dissenting opinion in *Morehead* v. *New York*, 298 U. S. 587, 635 (1936):

> We have had opportunity to perceive more clearly that a wage insufficient to support the worker does not visit its consequences upon him alone, that it may affect profoundly the entire economic structure of society and, in any case, that it casts on every taxpayer, and on the government itself, the burden of solving the problems of poverty, subsistence, health, and morals of large numbers in the community. Because of their nature and extent these are public problems. A generation ago they were for the individual to solve, today they are the burden of the nation.

Thus, the doctrine of freedom of contract is subject to constitutional limitations when confronted with legislation in the public interest founded upon recognition of the wage-earner's inability to bargain with his employer on an equal footing. In the words of Mr. Chief Justice Hughes in *West Coast Hotel Co.* v. *Parish*, 300 U. S. 379, 392:

> This power * * * to restrict freedom of contract has had many illustrations. That it may be exercised in the public interest with respect to contracts between employer and employee is undeniable."

Therefore, employers may not, under the guise of freedom of contract, relieve themselves of the obligations imposed upon them in the public int[illegible] through any agreement with their employees, whether entered into in advance of employment or after the work has been performed. Thus agreements of release, waiver, compromise and settlement or accord and satisfaction have uniformly been held unavailing as defenses to actions by employees to recover any part of sums required to be paid them under paramount provisions of a law enacted for the

public welfare. *U. S.* v. *Morley Constr. Co.*, 98 F. (2d) 781 (C. C. A. 2), cert. den. sub nom. *Maryland Casualty Co.*, v. *U. S.*, 305 U. S. 651; *Larsen* v. *Rice*, 100 Wash. 642, 171 Pac. 1037; *City of Glendale* v. *Coquat*, 46 Ariz. 478, 52 P. (2d) 1178; *Goebel* v. *Elliot*, 178 Wash. 444, 35 P. (2d) 44; *Cato* v. *Grendel Cotton Mills*, 132 S. C. 454, 129 S. E. 203; *Montague's Adm'r* v. *Massey*, 76 Va. 307; *Kehn* v. *State of New York*, 93 N. Y. 291; *Wright* v. *State*, 223 N. Y. 44; *Clark* v. *State*, 142 N. Y. 101; *Pitt* v. *Board of Ed.*, 216 N. Y. 304.

The doctrine has been well expressed in *Larsen* v. *Rice:*

> It is undoubtedly a general rule that private controversies between individuals sui juris may be compromised by them by mutual agreement, and that the courts will not, where no question of fraud intervenes, relieve from the agreement, even though it be shown that the one gained rights thereby to which he would not otherwise have been entitled, and that the other gave up rights to which he was fully entitled; this on the principle that compromises are favored by the law, since they tend to prevent strife and conduce to peace and to the general welfare of the community. But the controversy here had an added element not found in the ordinary controversy between individuals. It was not a wholly private concern. It was affected with a public interest. * * * The statute was not therefore intended solely for the benefit of the individual wage-earner. It was believed that the welfare of the public requires that wage-earners receive a wage sufficient for their decent maintenance. The statute being thus protective of the public as well as of the wage-earner, it must follow that any contract or settlement of a controversy arising out of a failure to pay the fixed minimum wage * * * is voidable, if not void * * *. Our opinion is that it is such a contract as the courts are not required to enforce, and that it would be against the policy of the statute so to do. [171 Pac. 1037, 1039-1040].

The nature of the Fair Labor Standards Act as remedial in character, designed to protect employees against sub-

standard labor conditions, and thus pregnant with the public interest, is apparent from the findings and declaration of policy which Congress recited in Section 2 of the Act. As this Court noted in *United States* v. *Darby*, 312 U. S. 100, 122-123 (1941), in sustaining the Act's constitutionality, that "the objectives of the Act expressed in Section 2 are highly remedial in character * * * the intention of Congress * * * should be examined in the light of the benefits sought to be bestowed upon millions of employees." See also *Overnight Transport Motor Co.* v. *Missel*, 316 U. S. 572, 576-577 (1942); *Bumpus* v. *Continental Baking Co.*, 124 F. (2d) 549, 551-552 (C. C. A. 6, 1941). Only recently this Court had occasion to reaffirm this principle in *Tennessee Coal Co.* v. *Muscoda Local*, 321 U. S. 590 (1944):

> These provisions * * * of the Fair Labor Standards Act are remedial and humanitarian in purpose. We are not here dealing with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profits of others. These are the rights that Congress has specially legislated to protect.

The same doctrine, therefore has been regularly applied in cases involving the Fair Labor Standards Act and the Courts have repeatedly repudiated as inconsistent with the public interest agreements which would permit the employer to escape the obligations imposed upon him under the Act by payment of anything less than that which the statute requires to be paid. Thus agreements to release, waive or compromise any portion of the liability created by the mandatory provisions of the Act have been held invalid, whether entered into before or after the employee's work has been performed. *Fleming* v. *Post*, F. (2) , 8 Labor Cases (C. C. H.) par. 62,450, 7 Wage Hour Rept. 1206 (C. C. A. 2, Dec. 14, 1944); *Fleming* v. *Warshawsky*, 123 F. (2d) 622 (C. C. A. 7, 1941);

Johnson v. *Dierks Lumber Co.*, 130 F. (2d) 115, 118 (C. C. A. 8, 1942); *Carleton Screw Products* v. *Fleming*, 126 F. (2d) 537, 541 (C. C. A. 8, 1942); *Birbalas* v. *Cuneo Printing Industries*, 140 F. (2d) 826 (C. C. A. 7, 1944); *Rigopoulos* v. *Kervan*, 47 F. Supp. 576 (S. D. N. Y., 1943), aff'd 140 F. (2d) 506 (C. C. A. 2, 1943); *Fiedler* v. *Potter*, 172 S. W. (2d) 1007 (Sup. Ct. Tenn., 1943); *Cudahy Packing Co. of Ala.* v. *Bazanos*, 15 So. (2d) 720 (Sup. Ct. Ala., 1943); *Hutchinson* v. *Barry*, 44 F. Supp. 829 (D. Mass., 1942); *Wilkinson* v. *Noland*, 40 F. Supp. 1009 (E. D. Va. 1941); *Travis* v. *Ray*, 41 F. Supp. 6 (E. D. Ky., 1941); *Hall* v. *Smith*, 5 Wage Hour Rept. 637, 6 Labor Cases (C. C. H.) par. 61,180 (E. D. Ky., 1942); *Strand* v. *Garden Valley Telephone Co.*, 51 F. Supp. 898 (D. Minn., 1943); *U. S.* v. *Johnson*, 52 F. Supp. 382 (W. D. N. Y., 1943).

This principle is aptly reflected in *Fleming* v. *Warshawsky* where releases were held invalid:

> The court found that they were obtained voluntarily and without coercion. In our view of the matter, the manner in which they were obtained is immaterial. * * * Defendants concede that an agreement, in advance of employment, to accept less than permitted by law would render nugatory the objectives of the Act. We think precisely the same result would follow if the employer, by agreement with its employees, be permitted to pay less than the Act prescribes. Waivers in advance of employment are no different in substance or effect than waivers of back pay for past employment. * * * In each situation, the statutory requirements and the purposes of the legislation are ignored [123 F. (2d) 622, 626].

As expressed by District (now Circuit) Judge Ford in *Hutchinson* v. *Barry*:

> The Act constitutes a declaration of public policy against substandard labor conditions. This policy would be defeated if the validity of contracts such as this were to be upheld. It is obvious that desire to

> continue in employment on the part of the laborer would make it easy for an employer who wished to ignore the Act's provisions to induce him to execute a release of claims under the provisions of the Act. Unless such agreements as this be declared void, it would therefore be easy to circumvent the declared purpose of Congress [44 F. Supp. 829].

The most recent judicial expression in point is the holding of the Second Circuit Court of Appeals in *Fleming* v. *Post*, where, under facts identical in every respect with those here, the Circuit Court affirmed judgment for employees in the amount of their unpaid liquidated damages. The court found that during the employment period in question "plaintiffs were not paid the overtime compensation required by Section 7 of the Act. After the decision of the Supreme Court in *Kirschbaum* v. *Walling*, 316 U. S. 517, the employees were paid" their back overtime "after each had signed a release * * * presented to him for signature. Thereafter they brought suit to recover the liquidated damages. The defendants contested on the ground that there had been an accord and satisfaction between the plaintiffs and the defendants after a bona fide dispute as to their right to collect the money; that the release barred the recovery of the statutory liquidated damages; that the employees were not covered by the Act". The Circuit Court held:

> We think there can be no valid release of the right to the payment of the back minimum and overtime wages. *O'Neil* v. *Brooklyn Savings Bank*, 293 N. Y. 666; *Fleming* v. *Warshawsky & Co.*, 123 F. (2d) 622, 626 (C. C. A. 7); we do not agree with *Guess* v. *Montague*, 140 F. (2d) 500 (C. C. A. 4). And Congress and the courts have considered the claim for back wages and to liquidated damages as a single right. See 83 Cong. Rec. 9255 (1938) (conference agreement); *Rigopoulos* v. *Kervan*, 140 F. (2d) 506 (C. C. A. 2). It would seem clear, therefore, that the same principle should govern the ability to release a claim for liquidated damages. *Strand* v. *Garden*

> *Valley Tel. Co.*, 51 F. Supp. 898, 904 (D. Minn.); cf. *United States* v. *Morley Construction Co.*, 98 F. (2d) 781 (C. C. A. 2). In any case, Congress probably did not intend any right created by the Fair Labor Standards Act for the employees benefit to be negotiable in a market where bargaining power is unequal 57 Harv. L. Rev. 257, 258 (1943) [F. (2d) , , 8 Labor Cases (C. C. H.) par. 62,450].*

Similarly affirming the right of employees to recover liquidated damages although they had executed releases upon receiving their back overtime, prior to suit, the Seventh Circuit Court of Appeals, in *Birbalas* v. *Cuneo Printing Industries, Inc.* held:

> The language of the statute and its interpretation by various courts tend toward promulgation of the doctrine that in cases such as this, the liability created by Congress for non-payment of overtime wages and for liquidated damages and attorney's fees may not be compromised; that it is a single and entire cause of action which cannot be discharged or satisfied by paying merely part of it. * * *
>
> If it were possible, we would prefer to sustain the validity of the releases, but no matter how much we may lament the law's harshness, the section appears to be mandatory. Relief from severity must come from the Congress and not from the Court. * * *
>
> Payment of compensation alone to persons endowed with additional rights was not sufficient to satisfy the entire liability. [140 F. (2d) 826, 828-829].

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* By virtue of this decision, the case of *Gangi* v. *D. A. Schulte*, 53 F. Supp. 844 (S. D. N. Y., 1943), upon which petitioner has placed great reliance, has now been reversed. Even in this case the District Court did not hold that a mere waiver or naked release would be a valid defense to an action for the damages, but, instead, asserted that an "accord and satisfaction" resulting from an "adjustment * * * (or) settlement * * * of disputes by arm's length negotiations" would be a valid bar to the damages and would not offend the legislative mandate. However, as noted, this case no longer represents the law in the Second Circuit even as to a *bona fide* accord and satisfaction.

Similar is the recent holding of the Fifth Circuit in *Atlantic Co. v. Broughton,* F. (2d) , 7 Wage Hour Rept. 1176, 8 Labor Cases (C. C. H.) par. 62,435 (C. C. A. 5, Dec. 4, 1944), where the employees had executed written releases upon receiving voluntary payment of back overtime:

> Under this Section if an employer on any regular payment date fails to pay the full amount of the minimum wages and overtime compensation due an employee, there immediately arises an obligation upon the employer to pay the employee the difference between the wages paid and the wages due, plus an equal additional amount as liquidated damages; and the payment thereafter of the balance due as wages, even though made prior to suit, does not release the accrued liability for liquidated damages. Such damages are not inflicted as a penalty, but are allowed as compensation for detention of a workman's pay.*

Again, in *Rigopoulos* v. *Kervan:*

> The plain and simple issue presented here * * * is whether or not the employer having paid plaintiffs the overtime pay due them may be relieved from the payment of the equal amounts as liquidated damages * * *.

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* Notwithstanding, the Fifth Circuit concluded that the liability for liquidated damages could be extinguished through a genuine "accord and satisfaction" based on a "bona fide settlement" of a "disputed question of fact" resulting from an "actual controversy relating to the number of hours worked". But, the court particularly noted that unless payment of the back overtime was made "under such circumstances as would create an agreement of accord and satisfaction", the claims for liquidated damages would "continue to be valid * * * enforceable obligations", despite the releases executed by the employees. [Note full statement of facts in 54 F. Supp. 185 (N. D. Ga., 1944).] Compare, however, the Second Circuit's holding to the contrary in *Fleming* v. *Post,* above cited: "We should reach the same result if there were here an accord and satisfaction." In any event the instant appeal involves no question of accord and satisfaction but only the legal sufficiency of defense of release.

See also footnote above, pages 5-6.

> At the time the employer paid these amounts he was already indebted to each employee in double such amount. Acceptance by the employee of this wage restitution * * * does not bar recovery of the additional amount as liquidated damages. If a worker is employed in excess of the specified hours without receiving the prescribed payment he is entitled to twice the amount of the underpayment. This provision of law giving the right to liquidated damages is mandatory and not discretionary. An employee may not bargain this right away. There must be full payment under the statute.
>
> The employee may not give a valid release of his rights against the employer in consideration of receiving payment of an amount less than that provided by statute.
>
> The question of good faith does not enter into the situation. * * * The language of the statute is clear and mandatory. [47 F. Supp. 576-577].

In affirming, the Second Circuit Court of Appeals said:

> The overtime compensation was paid long after it was due. Section 7 of the Act, 29 U. S. C. A. Sec. 207, plainly contemplates that overtime compensation shall be paid in the regular course of employment and not accumulated beyond a regular pay day. Hence the failure to pay it, when due, was a violation of Sec. 7, which rendered the employer "liable", as declared in Section 16(b), not only for the unpaid overtime compensation, but also, for liquidated damages in an additional equal amount. This is a single and entire liability. It is not discharged in toto by paying one-half of it. The liquidated damages provision has been held to be mandatory on the Courts regardless of the good faith of the employer or the reasonableness of his belief that no overtime compensation was

owed. *Overnight Motor Transp. Co. v. Missel*, 316 U. S. 572, 582-3. [140 F. (2d) 506].*

See also *Seneca Coal & Coke Co.* v. *Lofton*, 136 F. (2d) 359 (C. C. A. 10, 1943) cert. den. 320 U. S. 772 (1943).

In similar vein is the rationale of *Strand* v. *Garden Valley Telephone Co.*:

> Defendant also resists the action on the ground that the plaintiffs have released and discharged the defendant from liability on the claims for which recovery is sought. An employee under the Fair Labor Standards Act of 1938 may not bargain away such rights as are given by the Act. The right to damages for failure on the part of the employer to pay an employee the minimum wage is mandatory and does not become a matter of discretion for the courts, nor a matter of agreement between the parties. To hold otherwise would be an abortion of the intent of Congress, defeat in part the purposes for which the act was passed, and open the way to injustice, if not to fraud * * *. The plaintiff * * * did not have the right under the law to compromise or settle for lesser benefits than the law provides. Such receipt and release or agreement as were executed * * * did not bar recovery in this action. [51 F. Supp. 898, 904].

Particularly apposite is the decision in *United States* v. *Morley Constr. Co.*, 98 F. (2d) 781 (C. C. A. 2, 1938),

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* Nor could the result be different if the back overtime had been paid as a result of the settlement of an injunction suit instituted by the Wage and Hour Administrator to enjoin violation of the Act. As noted by the Second Circuit here, "none of the plaintiffs was a party to the Administrator's suit. The fact that some of them here paid in pursuance of a compromise of such suit we regard as completely irrelevant in the present action." Furthermore, the Administrator cannot compromise the rights of either the employee or the employer under the Act. *Colan* v. *Wecksler*, 45 F. Supp. 508 (S. D. N. Y. 1942); *Tidewater Optical Co.* v. *Wittkamp*, 19 S. E. (2d) 897, 901 (Sup. Ct. Va., 1942; *Rigopoulos* v. *Kervan*, 47 F. Supp. 576 (S. D. N. Y. 1942); *Strand* v. *Garden Valley Telephone Co.*, 57 F. Supp. 898 (D. Minn. 1943); *Emerson* v. *Mary Lincoln Candies*, 173 Misc. 531, aff'd 2[illegible] A. D. 879, aff'd 287 N. Y. 577.

cert. den. sub. nom. *Maryland Casualty Co.* v. *U. S.*, 305 U. S. 651 (1938):

> Their releases were void. The statute was passed to protect them against the economic pressure it was assumed they would be unable to resist, if offered a job. To this end it was as necessary to deny them the power to bargain away their privilege after they had performed their labor as before * * *. The statute, which forbade any contract that did not protect them, forbade any release—another contract—which deprived them of the protection so granted * * *. We are satisfied that the statute cannot be circumvented by so easy a device [98 F. (2d) 781, 788-789].

It follows, therefore, that the release executed by respondent was void and legally unavailing, as a defense, to bar a recovery here.*

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* To like effect are the numerous lower court decisions in the State of New York holding defenses of waiver, release and accord and satisfaction to be legally insufficient. See *Campbell* v. *Mandel Auto Parts*, 31 N. Y. Supp. (2d) 656 (Sup. Ct., N. Y., N. Y. Co., 1942), aff'd 264 App. Div. 701; *Engel* v. *Justrite Handkerchief Co.*, 180 Misc. 974, 43 N. Y. Supp. (2d) 688 (Sup. Ct., N. Y., N. Y. Co., 1943); *Schneider* v. *Sports Vogue, Inc.*, 35 N. Y. Supp. (2d) 431 (Sup. Ct., N. Y., Kings Co., 1942); *Withers* v. *Herbert McLean Purdy Management Corp.*, 181 Misc. 724, 47 N. Y. Supp. (2d) 260 (Sup. Ct., N. Y., N. Y. Co., 1944); *Asaro* v. *Lilienfeld*, 36 N. Y. Supp. (2d) 802 (City Ct., N. Y. C., N. Y. Co., 1942); *Rubin* v. *Meadow Provisions Co.*, 39 N. Y. Supp. (2d) 517 and 518 [two opinions] (City Ct., N. Y. C., N. Y. Co., 1942); *Greenbaum* v. *Meadow Provisions Co.*, N. Y. Law Journal, Nov. 13, 1942, 5 Wage Hour Rept. 919 (Sup. Ct., N. Y., N. Y. Co., 1942); *Bosse* v. *Cross & Brown Inc.*, N. Y. Law Journal, June 4, 1943, 6 Wage Hour Rept. 614 (City Ct., N. Y. C., N. Y. Co., 1943); *Jervanian* v. *Brown, Wheelock etc.*, N. Y. Law Journal, Oct. 20, 1943, 6 Wage Hour Rept. 1209 (City Ct., N. Y. C., N. Y. Co., 1943); *Katz* v. *Film Metal Box Corp.*, 181 Misc. 812, 47 N. Y. Supp. (2d) 454 (City Ct., N. Y. C., Bnx. Co., 1944)

C.

The decision in *Guess* v. *Montague*, 140 F. (2d) 500 (C. C. A. 4, 1943), involving an accord and satisfaction, is both inapposite and legally unsound.

Confronted with the great weight of authority which has unanimously rejected the defense of release in an action of this character as contrary to the legislative mandate, petitioner seeks judicial support for its position in *Guess* v. *Montague*, 140 F. (2d) 500 (C. C. A. 4, 1943). In that case it appeared that "defendant was doubtful as to whether the Act applied to his business"; accordingly, "he called in the plaintiffs, explained the situation to them", and plaintiffs agreed to accept the amount tendered, constituting the back overtime, "as full settlement" and "in full discharge and satisfaction", and executed releases. The Fourth Circuit, although conceding that nothing less than payment in full could ever discharge the obligation for the back overtime, held that under such circumstances as would create "a contract of accord and satisfaction", there might be a valid acquittance of the mandatory liability for liquidated damages. Petitioner has recognized that this case "gives effect to accord and satisfaction" based upon a "settlement" of "a dispute as to coverage of the Act" (Pet. for Writ, pp. 8-9). Clearly, the Fourth Circuit did not hold that the release executed by the employee was a good defense, but only that the mandatory liability for the liquidated damages could be extinguished through a genuine accord and satisfaction.*

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* The distinction was clearly recognized in *David* v. *Atlantic Co.*, 26 S. E. (2d) 650 (Ga. Ct. App., 1943), which follows the minority view. After noting some of the many cases which have unanimously rejected defenses of release, the court stated: "The controlling difference between these cases and the instant one is that here the agreed statement of fact shows that a bona fide dispute

(*Continued on following page*)

The conclusion reached in the *Guess* case is, in any event, based upon an erroneous interpretation of the Fair Labor Standards Act. The decision rests upon a mistaken assumption that the liability imposed by Section 16(b) for violation of Sections 6 or 7 consists of two separate and distinct claims or causes of action, "one for the balance of the minimum wages and overtime compensation fixed by law, the other for liquidated damages in a like amount". Upon this erroneous premise the Fourth Circuit bases its conclusion that the assumed separate and distinct liability for liquidated damages is not affected with the public interest and thus may properly be the subject of a genuine or *bona fide* "contract of accord and satisfaction". The unsoundness of both the premise and the conclusion may be readily demonstrated.

In the first place, the plain language of Section 16(b) indicates that, immediately upon an employer's failure to pay overtime as required by Section 7, there springs into being a single, entire and indivisible liability to the employee in twice the amount of the underpayment.* And Congress, in providing the remedy for violation, has referred to it as "*action* to recover such *liability*."

Typical of the clear weight of authority contrary to the reasoning in the *Guess* case is the holding in *Rigo-*

(*Continued from previous page*)

existed between the parties as to whether the employer's work constituted interstate commerce within the meaning of the statute, and as to the actual number of overtime hours worked by the employee, while it did not appear in any of the above cited cases that such a bona fide dispute between the parties existed." The court then concluded that, in the absence of "a settlement of a bona fide dispute between the employer and his employee", the cases holding releases to be invalid "are sound".

See also discussion above at page 15.

* "Any employer who violates * * * shall be liable to the employee or employees affected in the amount of * * * their unpaid overtime compensation * * * and in an additional equal amount as liquidated damages". 29 U. S. C. § 216(b).

poulos v. *Kervan*, 140 F. (2d) 506, 507 (C. C. A. 2, 1943) that a violation of Section 16(b) creates a "single and entire liability * * * not discharged in toto by paying one-half of it". To the same effect is *Birbalas* v. *Cuneo Printing Industries*, 140 F. (2d) 826, 829 (C. C. A. 7, 1944) where the Court observed that "rather than conclude that the cause of action consists of two claims, as indicated in *Guess* v. *Montague*, we prefer the thought expressed by the Second Circuit in *Rigopoulos* v. *Kervan*, that this is a single and entire liability * * *. The cause of action is one and indivisible." The most recent judicial expression in point is *Fleming* v. *Post*, F. (2d) , 7 Wage Hour Reporter 1206, 8 Labor *Cases* (C. C. H.) par. 62,450 (C. C. A. 2, Dec. 14, 1944) where the Second Circuit stated: "We do not agree with *Guess* v. *Montague*, 140 F. (2d) 500 (C. C. A. 4). And Congress and the Courts have considered the claim for back wages and to liquidated damages as a single right. See 83 Cong. Rec. 9255 (1938) (conference agreement)". See also *Loggins* v. *Steel Construction Co.*, 129 F. (2d) 118, 120 (C. C. A. 5, 1942); *Northwestern Yeast Co.* v. *Broutin*, 133 F. (2d) 628, 630-641 (C. C. A. 6, 1942); *Barrineau* v. *Carolina Milling Co.*, 52 F. Supp. 197, 199 (D. S. C. 1942); and compare *Seneca Coal & Coke Co.* v. *Lofton*, 136 F. (2d) 359, 363 (C. C. A. 10, 1943), cert. den. 320 U. S. 772 (1943).*

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* The conclusion reached by the Fourth Circuit becomes the more untenable when viewed in the light of the assertion that because the "triple damages under the Patent Statutes" can be "settled by agreement," therefore, by analogy, the liquidated damages under the Wage and Hour Act, should, equally be the subject of a valid accord and satisfaction. But the character and purposes of the two statutes are radically different. The damages under the Act, upon violation, are liquidated in amount, mandatory in character and constitute a compensatory assessment which the Courts have no discretion to relax. On the other hand, the damages flowing from an infringement of the Patent Statutes are highly speculative and, having always been held penal from the very nature of things (*Spiedel Co.* v. *Barstow Co.*, 232 Fed. 617; *Van Choate* v. *General Electric Co.*, 245 Fed. 140), are, therefore, not highly regarded by the courts.

The decision in *Guess* v. *Montague* was the subject of sharp criticism in 57 Harv. L. Rev. 257, 258 (1943):

> The purpose of this statute is to assure the employee certain rights and conditions which he is unable to secure for himself because of the superior bargaining power of the employer. • • • The Supreme Court has held that the right to liquidated damages is compensatory for the uncertain damages caused the employee by the retention of his legal wages and that good faith on the part of the employer does not affect this right. • • • And previous decisions have indicated that the employee could not surrender it. • • • The Courts have generally declared a contract of accord and satisfaction for less than the minimum wage illegal as opposed to the policy of the Act. • • • *And it would seem that Congress contemplated no difference between the employee's right to recover unpaid wages and his right to an equal amount in liquidated damages; both were lumped together and considered as a single recovery.* See 83 Cong. Rec. 9255 (1938) (conference agreement). The instant court differentiated between these two rights on the ground that the payment of the minimum wage is expressly required by Sec. 6 of the statute. But since that section does not give the employee any rights, it should not affect the interpretation of Sec. 16(b) which treated the two rights given the employee as of equal importance. It would seem illogical, therefore, to consider the right to the wage deficiency inviolate, but the right to liquidated damages releasable (Italics supplied).

See also 43 Columbia Law Review 355, 359 (1943).

Following the rationale of the decision in the *Guess* case, *supra*, petitioner has suggested that liquidated damages are to be distinguished from "the base liability" (Pet. Br., p. 7), and that they "are not public but personal rights" (Pet. for Writ, p. 11). This contention overlooks the nature and function of the provision for liquidated damages in the particular statute involved here. What petitioner designates as "the base

liability" under the Act is not fundamentally different from the liability for liquidated damages so far as the public interest is concerned. To those familiar with the problems of wage earners, for whose protection the Fair Labor Standards Act was enacted, it is axiomatic that the maintenance of a decent subsistence standard of living is as much dependent upon *timely payment of wages* as upon the amount of the wages. A reasonable or even a high wage rate may decrease in value and become substandard because of delays and uncertainties in the time of payment or because of the infrequency of the pay periods. Delay in the payment of wages, no less than low wage rates, results in "a wage insufficient to support the worker," and may affect profoundly "the burden of solving the problems of poverty, subsistence, health and morals of large numbers in the community." [*Morehead v. New York*, 298 U. S. 587, 635.]*

It has been repeatedly emphasized in the literature on the subject of wages and wage collection that "for the great number of wage earners who are completely dependent each week upon their wages it is important to receive their pay without delay" and that "even a short delay causes hardship" and "brings want and privation." See *Report of Committee on Wage Collection* (1936), Bulletin No. 629, United States Department of Labor, Bureau of Labor Statistics, page 139. To give an employee the same amount of wages after the lapse of time is in effect to pay him at a reduced rate.

> Whatever the nominal amount [of wages] may be, the frequency of the time of payment is a matter of concern to the laborer. The longer he must wait for his wages the greater is the extent of his need for credit, and accordingly the higher will be his cost of living and the lower his real wages. [Commons and Andrews, *Principles of Labor Legislation* (1936), p. 330.]

* The soundness of this principle is particularly emphasized by the exigencies of the present case where respondent, employed at the marginal wage of $23 for a 72 hour workweek (R. 14-15), was deprived of his overtime wages for a period of four years.

It has been uniformly held that the rigid requirements of the Act, designed to effecuate the paramount public policy with which it is profoundly affected, can be satisfied only by prompt payment of the overtime wages as currently earned in the regular course of employment.* *Seneca Coal & Coke Co.* v. *Lofton*, 136 F. (2d) 359 (C. C. A. 10, 1943), cert. den. 320 U. S. 772 (1943); *Rigopoulos* v. *Kervan*, 140 F. (2d) 506 (C. C. A. 2, 1943); *George Lawley & Son Corp.* v. *South*, 140 F. (2d) 439, 442 (C. C. A. 1, 1944), cert. den. ——— U. S. ———, May 22, 1944; *Birbalas* v. *Cuneo Printing Industries*, 140 F. (2d) 826 (C. C. A. 7, 1944); *Culver* v. *Bell & Loffland*, 7 Wage Hour Rept. 1190, 8 Labor Cases (C. C. H.) par. 62,443 (C. C. A. 9, 1944); *Atlantic Co.* v. *Broughton*, 7 Wage Hour Rept. 1176, 8 Labor Cases (C. C. H.) par. 62,435 (C. C. A. 5, Dec. 4, 1944); *Emerson* v. *Mary Lincoln Candies*, 173 Misc. 531, 174 Misc. 353, aff'd 261 A. D. 879, aff'd 287 N. Y. 577; *Southern Package Corp.* v. *Walton*, 18 So. (2d) 458 (Miss. Sup. Ct., 1944), cert. den. ——— U. S. ———, Oct. 23, 1944.

Indeed, the statutory aims are completely frustrated when, as here, the employee is deprived of his wages for a period of four years and the employer is able thereby to derive unfair advantage over a competitor who scrupulously adheres to the Act's requirements.

D.

Answering petitioner's brief.

Petitioner has sought to rely on the fact that the statute, as originally drawn, contained a provision that

> Any contract, agreement, understanding, condition, stipulation, or provision binding any person to waive

* The public policy to enforce prompt payment is also manifest in Section 196 of the New York State Labor Law, which requires that "every person carrying on business * * * shall pay weekly to each employee the wages earned."

compliance with any provision of this Act or with any regulation or order thereunder shall be null and void [Senate report No. 844, 75th Cong., 1st Sess., 1937].

It has been argued that the elimination of this provision from the final bill by the Conference Committee indicates congressional intent to permit private settlements (Pet. Br., pp. 10-11).

It is clear, however, that this provision was omitted from the bill merely because Congress considered it unnecessary. Any doubt in this regard is dispelled by the fact that the provision relied on was stricken out together with another subsection of the same section of the bill which made "void any contract made in violation of any provisions of the Act". Such contracts have been held void by this Court *in the absence of any provision in the statute*. *Overnight Motor Corp.* v. *Missel*, 316 U. S. 572; *Tennessee Coal, Iron & R. R. Co.* v. *Muscoda Local*, 321 U. S. 590; *Walling* v. *Helmerich & Payne*, U. S. , Nov. 6, 1944. See also *United States* v. *Morley Const. Co.*, 98 (2d) 781, 788 (C. C. A. 2), cert. den. 305 U. S. 651. It is clear therefore that, in striking these provisions from the proposed bill, Congress was merely eliminating the obvious.*

Of further significance is the fact that at the time the non-waiver provision was removed from the proposed bill, the latter contained no provision for employee suits similar to the present Section 16(b). The mandatory liability created by this section, as subsequently added, in favor of the employee, obviously removed any need for a non-waiver clause.

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* It is fundamental that a waiver or release of protective rights which is inconsistent with the public policy which the legislative act manifests is no less invalid because the enactment involved contains no express prohibition against a waiver of the statute's benefits. *Wood* v. *Horgan*, 291 N. Y. 422, 426; *Crowe* v. *Liquid Carbolic Co.*, 208 N. Y. 396.

Section 16(b), with its peremptory language, was the method or expedient deemed necessary by the legislators to insure compliance with the Act. "An action under Section 16(b) * * * is one in which the public has a decided interest. It is one method by which the congressional conception of public policy is enforced * * *. The liability of an employer under the Act is something more than a debt or a liability to an individual. An employee exercising his rights under Section 16(b) of the Act exercises them * * * for the benefit of the general public". *Plourde* v. *Mass. Realty Co.*, 47 F. Supp. 668 (D. Mass. 1942). "The objectives of the Act and the methods employed to obtain them may not be set at naught by agreements between the parties * * *. To approve a waiver by employees * * * would be to thwart the purposes of the Act". *Wilkinson* v. *Noland*, 40 F. Supp. 1009 (D. C. Va. 1941).

Finally, the many authorities cited by petitioner sustaining settlements of controversies or compromises of disputed claims under legislation of a different character are not here in point (compare Pet. Br., pp. 13-14). As has been observed, there is here involved no question of accord and satisfaction. Moreover, this Court in *Midstate Horticultural Co.* v. *Penn. R. R. Co.*, 320 U. S. 356, 88 L. Ed. 83 (1943) recently took cognizance of the inherent inhibition against waivers of rights created by statutes affecting the public welfare. In construing the Interstate Commerce Act, also a "public policy" enactment, the Court rejected a similar contention, "* * * Not unmindful of the hardship * * * in the special circumstances * * * (or) the strong equitable considerations which, in relation to other types of legislation not so permeated with provisions and policies for protecting the general public interest, might move against denying effect to such an agreement," the Court, nevertheless, held:

> Section 16 is an integral part of the Interstate Commerce Act and of the comprehensive scheme of regu-

> lation it imposes. The Act is affected, throughout its provisions, with the object not merely of regulating the relations of carrier and shipper inter se, but of securing the general public interest * * *. Accordingly, in respect to many matters concerning which variation in accordance with the exigencies of particular circumstances might be permissible, if only the parties' private interests or equities were involved, *rigid adherence to the statutory scheme and standards is required.* This obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce.*

The parallel is readily apparent.

Conclusion

In view of considerations of paramount public policy, the release which respondent was required to sign when paid only his back overtime was void and ineffective to bar his recovery of liquidated damages. It is respectfully submitted, therefore, that the judgment below should be affirmed.

Respectfully submitted,

MAX R. SIMON,
Attorney for Respondent.

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* Here, too, the statute did not expressly forbid a waiver.

Appendix

Pertinent provisions of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; 29 U. S. C. Secs. 201 et seq.) read as follows:

* * * * *

Sec. 7(a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce.

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

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Sec. 16(b). Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.